Wong Yuen Hock v Ban Hin Lee Bank Bhd & Anor

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W–02–420 OF 1998
DENIS ONG, MOHD NOOR AHMAD AND ALAUDDIN JJCA
18 JULY 2002

Civil Procedure *— Parties — Intervention — Appellant's land auctioned off to second respondent — Second respondent bona fide purchaser without notice and had paid full purchase price — Second respondent obtaining leave to intervene in appellant's application to set aside the auction sale — Second respondent failing to apply to be added as a party — Subsequent application by — Second respondent seeking possession of land against appellant — Whether intervener had successfully made himself a party to the action and entitled to possession of land*

The appellant, the registered proprietor of land charged the said land to the first respondent as a security for a loan granted to one Good Rich Corporation Sdn Bhd ('the borrower'). The borrower defaulted in paying the loan and the first respondent commenced foreclosure proceedings and obtained an order for sale in respect of the land. The land was subsequently sold to the second respondent ('the intervener') on 8 April 1996, and after the full purchase price was paid, the land was registered in the name of the second respondent on 30 July 1997. The appellant applied to set aside the auction sale held on 8 April 1996 and the second respondent applied for leave to intervene in the said application. The second respondent's application for leave to intervene and to be added as an intervener was granted and the appellant's application to set aside the auction sale was dismissed. However, the appellant was still occupying the land and the second respondent, as intervener, on 7 August 1997 filed an application by way of summons in chambers ('encl 77') seeking, amongst others, possession of the said land against the appellant. The appellant applied for a stay of the order giving possession to the second respondent pending the disposal of his appeal ('encl 83'). The judge allowed encl 77 and dismissed encl 83. The appellant appealed regarding encl 77 and argued that the second respondent had not taken steps to make himself a party to the action after he had obtained leave to intervene.

Held, dismissing the appeal with costs to the second respondent only:

(1) The intervener in the instant appeal had properly applied for and obtained leave to intervene and be added as a party, though only as 'an intervener' which was a mistake in respect of nomenclature only. In substance, he was a party to the proceedings (see s 72 of the Courts of Judicature Act 1964) (see p 196H–I).

(2) Further, what the intervener had stated in his affidavit (at p 197B of the report) was very much consistent with the observation made by Gopal Sri Ram JCA in *Aik Ming* (at p 197B of the report), although that case was distinguishable on the facts (see pp 196I–197B); *Aik Ming (M) Sdn Bhd v Chang Chin Chuan* [1995] 2 MLJ 770 distinguished.

(3) The second respondent was a bona fide purchaser without notice and had paid the purchase price in full, and he certainly was entitled to possession of the said land. The second respondent, as an intervener, had successfully made himself a party to the action and was therefore entitled to make the application seeking the reliefs aforesaid (see p 197E, G); *M & J Frozen Food Sdn Bhd & Anor v Siland Sdn Bhd & Anor* [1994] 1 MLJ 294 referred.

[Bahasa Malaysia summary

Perayu, tuanpunya berdaftar tanah telah mencagarkan tanah tersebut kepada responden pertama sebagai satu jaminan untuk satu pinjaman yang diberikan kepada Good Rich Corporation Sdn Bhd ('peminjam'). Peminjam telah gagal untuk membayar pinjaman tersebut dan responden pertama telah memulakan prosiding halang tebus dan mendapat satu perintah jualan berhubung tanah tersebut. Tanah tersebut seterusnya telah dijual kepada responden kedua ('pencelah') pada 8 April 1996, dan setelah harga belian penuh dibayar, tanah tersebut telah didaftarkan atas nama responden kedua pada 30 Julai 1997. Perayu telah memohon untuk mengenepikan jualan lelongan yang diadakan pada 8 April 1996 dan responden kedua memohon kebenaran untuk mencelah dalam permohonan tersebut. Permohonan responden kedua untuk kebenaran mencelah dan dimasukkan sebagai pencelah telah dibenarkan dan permohonan perayu untuk mengenepikan jualan lelongan ditolak. Namun begitu, perayu masih menetap di atas tanah tersebut dan responden kedua, sebagai pencelah, pada 7 Ogos 1997 memfailkan satu permohonan melalui saman dalam kamar (lampiran 77) memohon, antara lain, milikan ke atas tanah tersebut terhadap perayu. Perayu memohon untuk satu penggantungan perintah yang memberikan milikan kepada responden kedua sementara menunggu rayuan beliau selesai (lampiran 83). Hakim telah membenarkan lampiran 77 dan menolak lampiran 83. Perayu telah membuat rayuan berhubung lampiran 77 dan berhujah bahawa responden kedua tidak mengambil langkah-langkah untuk menjadikan beliau satu pihak kepada tindakan setelah beliau mendapat kebenaran untuk mencelah.

Diputuskan, menolak rayuan tersebut dengan kos kepada responden kedua sahaja:

(1) Pencelah dalam rayuan ini telah memohon dengan betul dan mendapat kebenaran untuk mencelah dan dijadikan sebagai satu pihak, walaupun hanya sebagai 'pencelah' yang mana adalah satu kesilapan berhubung tatanama sahaja. Pada amnya, beliau adalah satu pihak kepada prosiding (lihat s 72 Akta Kehakiman Mahkamah 1964) (lihat ms 196H–I).

(2) Tambahan pula, apa yang pencelah telah nyatakan dalam afidavit beliau (di ms 197B kes ini) adalah amat konsisten dengan pemerhatian yang dibuat oleh Gopal Sri Ram HMR dalam *Aik Ming* (di ms 197B kes ini), walaupun kes tersebut dapat

A dibezakan atas fakta-fakta (lihat ms 196I–197B); *Aik Ming (M) Sdn Bhd v Chang Chin Chuan* [1995] 2 MLJ 770 dibezakan.

(3) Responden kedua adalah pembeli bona fide tanpa notis dan telah membayar harga belian sepenuhnya, dan beliau sememangnya berhak untuk memiliki tanah tersebut. Responden kedua, sebagai B pencelah, telah berjaya menjadikan diri beliau satu pihak kepada tindakan dan oleh demikian berhak membuat permohonan memohon relif-relif yang tersebut; *M & J Frozen Food Sdn Bhd & Anor v Siland Sdn Bhd & Anor* [1994] 1 MLJ 294 dirujuk (lihat ms 197E, G).]

C **Notes**

For cases on intervention, see 2 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 4208–4236.

Cases referred to

D *Aik Ming (M) Sdn Bhd v Chang Chin Chuan* [1995] 2 MLJ 770 (distd)
M & J Frozen Food Sdn Bhd & Anor v Siland Sdn Bhd & Anor [1994] 1 MLJ 294 (refd)

Legislation referred to

E Courts of Judicature Act 1964 s 72

Appeal from: Originating Summons No OSF/OS/AE38–275 of 1994 (High Court, Kuala Lumpur)

Tan Soo Leong (*SL Tan & Assoc*) for the apellant.
F *Cindy Goh* (*Cheang & Ariff*) for the first respondent.
Lim Chee Wee (*Skrine*) for the second respondent.

Alauddin JCA (delivering the judgement of the court): In this appeal before us, the appellant is the registered proprietor of land held under HS(D)T 891 and HS(D) 2039, PT No 8944, and PT No 10103, Mukim G Sungei Buloh, Daerah Petaling ('the said land').

On 27 June 1994, the appellant charged the said land to the first respondent as a security for a loan granted to Good Rich Corporation Sdn Bhd ('the borrower').

The borrower defaulted in paying the loan and the first respondent then H commenced foreclosure proceedings and obtained an order for sale in respect of the said land. After several unsuccessful attempts to auction the said land, they were eventually sold to the second respondent ('the intervener') on 8 April 1996 for the purchase price of RM300,000. After the full purchase price was paid, the land was subsequently registered in the name of the second respondent on 30 July 1997.

I On 22 June 1996, the appellant applied to the High Court to set aside the auction sale held on 8 April 1996. At the same time, the second respondent applied for leave to intervene in the said application. The

learned judge granted the second respondent leave to intervene and be added as an intervener and dismissed the appellant's application to set aside the auction sale.

Since the appellant was still occupying the said land after his application was dismissed by the High Court, the second respondent, as intervener, had on 7 August 1997 filed an application by way of summons in chambers (encl 77) seeking, amongst others, declarations, possession of the said land, injunction, damages and costs against the appellant. By way of another application (encl 83) the appellant applied for stay of the order of giving possession of the said land to the second respondent pending the disposal of his appeal.

Both encls 77 and 83 were heard together by the learned judge. The learned judge decided to grant the second respondent's application (encl 77) and dismissed the appellant's application (encl 83). Hence, the present appeal before us in respect of encl 77 only.

Before us, learned counsel for the appellant argued that after the second respondent had obtained leave to intervene he had failed to take steps to make himself a party to the action either as co-plaintiff or co-defendant. Consequently, no pleadings were served on the appellant by the second respondent. Learned counsel for the appellant contended that leave to intervene granted to the second respondent was only specifically for the purpose of his intervention or opposition to the appellant's application to set aside the auction sale and nothing more.

In support of his contention, learned counsel for the appellant cited the case of *Aik Ming (M) Sdn Bhd v Chang Chin Chuan* [1995] 2 MLJ 770. In that case, the Court of Appeal had occasion to consider the status of an intervener. Delivering the judgment of the court (at p 791) the learned Gopal Sri Ram JCA had this to say:

> Notwithstanding all this, the intervener was not joined as a party to the action. Even when the intervention took place for the limited purpose of setting aside the injunction, no steps were taken by the plaintiff to add the intervener as a co-defendant to the action. Neither did the intervener apply to have itself added as a party.
>
> There was no pleading delivered by the plaintiffs against the intervener. All that was placed on record was the affidavit of Dato' Tan filed in support of the application to set aside the injunction. In short, every fundamental rule of practice and procedure had been flouted.

Having carefully read and examined the judgment in *Aik Ming*, we must say, with the greatest of respect to learned counsel for the appellant, that the facts in *Aik Ming* are very much distinguishable from the facts of the instant appeal.

As we have alluded to earlier, the intervener in the instant appeal had properly applied for and obtained leave to intervene and be added as a party though only as 'an intervener' which to our mind is a mistake in respect of nomenclature only. In substance, he is a party to the proceedings (see s 72 of the Courts of Judicature Act 1964).

Futher, in his affidavit supporting the said application for leave, this is what the intervener said at para 7:

A Oleh kerana saya adalah pemilik sah hartanah tersebut, saya adalah suatu pihak yang berkepentingan dalam prosiding ini. Kini saya memohon kepada mahkamah mulia ini untuk keizinan mencelah dalam prosiding ini oleh kerana saya akan terjejas oleh mana-mana perintah yang mungkin dibuat oleh mahkamah mulia ini berhubung dengan perkara ini dan *defendan hendaklah menjadikan saya suatu pihak kepada permohonan ini pertama-tamanya.* (Emphasis added).

B

In our opinion, what the intervener had stated in his affidavit is very much consistent with the observation made by the learned Gopal Sri Ram JCA in *Aik Ming* where his Lordship stated (at p 791):

C What ought to have been done is this. When the interverner was given notice of the suit and of the injunction obtained therein, its solicitors ought to have written to the plaintiff's solicitors putting them to their elections: that they either add their client as a co-defendant to the action and amend their statement of claim to raise a case against the intervener or that an application in that behalf would be made by the intervener. If the plaintiffs had demurred upon that request, then the application for intervention could and should have been made. In any event, when the application came to be made, there ought D to have been a prayer in the summons asking for an order that this intervener be added as a co-defendant and for directions on the delivery of pleadings by the parties including a direction requiring the plaintiffs to plead their case against the co-defendant. No difficulty on this last requirement would have been encountered because there were the necessary averments in paras 60, 61 and 64 of the statement of claim.

E Before concluding, we may add that as the learned judge had rightly decided that the second respondent was a bona fide purchaser without notice and had paid the purchase price in full, in our judgment, he certainly was entitled to possession of the said land. In this respect, we need only refer to the case of *M & J Frozen Food Sdn Bhd & Anor v Siland Sdn Bhd & Anor* F [1994]1 MLJ 294 where it was held by the then Supreme Court that in an auction, the vendor is regarded as having divested himself of all the beneficial interest in his land and vested it in the purchaser only at the time when the memorandum of transfer is executed and the purchase money is paid in full.

Having considered the facts and circumstances of this appeal, we are of G the view that the second respondent, as an intervener, had successfully made himself a party to this action and was therefore entitled to make the application seeking the reliefs aforesaid.

Having given this appeal our utmost consideration, we are unanimous that this appeal cannot succeed.

H The appeal is dismissed with costs to the second respondent only. Deposit towards account of taxed costs.

My learned brothers, Denis Ong Jiew Fook JCA and Mohd Noor Ahmad JCA had seen this judgment in draft and had expressed their agreement with it.

I *Appeal dismissed with costs to the second respondent only.*

Reported by Chew Phye Ken